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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Attorney for:
Thought, Inc. – Third Party Non-Litigant

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

FIRESTAR) **MOTION TO COMPEL ANSWERS TO REQUEST**
SOFTWARE, INC) **FOR STIPULATIONS AND INFO SERVED BY**
) **THOUGHT INC.'S RE MOTION TO QUASH THIRD**
) **PARTY SUBPOENA, OR IN THE ALTERNATIVE**
) **FOR A PROTECTIVE ORDER;**
Plaintiff,) **[PROPOSED ORDER]**
)
v.)
)
) **[CASE NO. C 07-80204 MISC MMC (EMC)]**
RED HAT, INC.)
)
)
Defendant.)
)
)
)

**REQUEST FOR ORDER TO REQUIRE REDHAT TO ANSWER
STIPULATION TO FACTS AND INFORMATION FROM REDHAT
ATTORNEYS AS UNAVAILABLE WITNESSES**

Here comes Thought further to a request for a continuation of the hearing date in
the above matter, which has been mutually agreed upon by the parties to be continued

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1 until October 17, 2007 at 2:30 p.m. to permit more time for a true meet and confer and to
2 permit more time for certain actions of the parties to occur (filed under separate cover).
3

4 In a conversation between RedHat's local representative Mr. Harvey and the
5 undersigned on today's date, Mr. Harvey stated a willingness to have a real meet and
6 confer on the issues and concerns of both parties and asked for a telephonic conference
7 tomorrow that would include a conversation between a Thought IT person and a RedHat
8 IT person regarding the costs of more limited production. Unfortunately, the Thought IT
9 person will not be available and the hearing for the motion is imminent. Moreover, it also
10 seems unlikely that Jon Pierce and Steve Moore will have time to provide answers to the
11 stipulations and requests for information that Thought filed upon them this past Friday,
12 September 28, 2007, hence the parties have agreed upon a continuance.
13

14 Therefore, to focus the meet and confer during the continuance Thought wishes to
15 negotiate between the parties the following issues and to obtain the following information
16 to expedite the negotiations:
17

18 1) Time for Thought to obtain clear and direct answers under oath to the Items
19 1-12 in the stipulation of facts and requests for information that were served upon RedHat
20 by Thought on September 28, 2007.

21 2) Negotiate and narrow the subpoena to only having Thought look for and
22 produce for RedHat the documents that were offered as a courtesy to RedHat in the
23 August 10, 2007 conference and in the August 15, 2007 email (any software releases and
24 documentation that were provided to the public as confidential and copyrighted
25 documents during the period prior to August 25, 1998 as set forth in the RedHat
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1 Subpoena) providing an adequate set of protective restrictions and use as set forth in the
2 August 15, 2007 email can be obtained (see below).
3

4 3) Negotiate between IT professionals at Thought and an IT professional on
5 RedHat's team a process and cost restrictive way to product items set forth in (2), such as
6 to set up a budget cap amount and to either stop the entire process without recourse when
7 the budget is reached based upon \$375 per hour for the Thought professional's time, or to
8 negotiate at that time to agree upon a mutually acceptable way to proceed in a cost
9 effective manner, in order that the legal concerns of both sides can be met while the
10 production is proceeding. Mr. Harvey agrees to place a copy of the Ward Affidavit
11 (served upon RedHat on September 28, 2007) in the hands of the RedHat IT
12 professionals at once so they may understand the issues that are faced, and whether the
13 information is even prior art.
14

15 4) Negotiate and execute a protective order or other equivalent weighted
16 supplemental protective agreement between just the two parties that includes at least the
17 following essential elements: (i) does not permit the RedHat principles to have access to
18 such software or study notes from its analysis, while specifically prohibiting any RedHat
19 principle or other RedHat professional reviewing such information for an understanding
20 of the Thought technology, (ii) initially only permits the use of any Thought software and
21 documentation for an ORM expert to better understand the Thought patent (if there is a
22 showing of the expert then for an actual need to further use the information at a later
23 point, then Thought agrees to negotiate in good faith to provide specific permission for
24 that further use to be mutually agreed upon in writing by the parties, which permission
25 will not be unreasonably withheld providing that an adequate protective and secrecy
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1 order is in place), (iii) does not permit any reverse engineering of the Thought software or
2 object code produced by it, (iv) requires an independent third party (no RedHat personnel
3 or person who has ever been a code contributor or consultant to the Hibernate project) to
4 do the software evaluation and to only share the results with legal team that is defending
5 RedHat for purposes of the defense of RedHat that should only occur under an adequate
6 protective and secrecy order, and (v) agreeing to destroy or return to Thought any items
7 provided and any notes or copies relating to such items upon completion of the trial.
8

9
10 5) Negotiate and obtain settlement regarding Thought's expenses to date in
11 dealing with this matter, after the above referenced stipulations and requests for
12 information (Items 1-12) are provided to Thought by RedHat.
13

14 As previously mentioned by Thought representatives, the items referred to above
15 for production purposes, can be looked for and provided to RedHat (if they are available)
16 as a mere courtesy to RedHat, since they are considered either duplicative or cumulative
17 over the Thought patent. Thought notes that the mere fact that the Thought patent or
18 software release implementations might have occurred prior to August 25, 1998 does not
19 mean that they are prior art against the Firestar Patent and necessary for RedHat's
20 defense. Instead they may be prior publications of mere curiosity, albeit of high
21 importance to Thought as proprietary intellectual property.
22

23 As proffered by Thought previously, for RedHat to make a showing of necessity
24 for their Subpoena to obtain legacy and proprietary information (rather than to obtain a
25 professional courtesy from Thought) they would have needed to provide some
26 compelling evidence under U.S. Patent laws that a feature in the Firestar patent claims
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1 (Ontos Patent) is reasonably shown, taught or suggested (or is likely to be reasonably
2 shown) by the Thought patent or its progeny implementations of patented concepts to do
3 substantially the same thing in substantially the same manner. It is not enough that they
4 are in similar fields of endeavor, as judicial notice is taken that in the field of “traveling
5 from New York City to San Francisco” there are literally thousands of unrelated ways to
6 get from there to here. To date, RedHat has not even provided any factual information
7 that the Thought patent has been reviewed sufficiently to believe that the progeny
8 software implementations requested might even be relevant such as to justify a subpoena
9 of proprietary and legacy information from Thought. Thus, RedHat has failed to meet
10 their initial burden under the Subpoena of showing any necessity of Thought proprietary
11 information for RedHat’s reasonable defense.
12

13
14 Even in view of the above, Thought would like to be cooperative and helpful to
15 the Court in this matter. So, Thought request more time for a meet and confer to settle
16 such issues, by agreeing to a continuance.
17

18 Since the RedHat North Carolina attorneys Jon Pierce and Steve Moore are
19 unlikely to be available in California as witnesses on the date of the hearing of the
20 Thought Motion to Quash, (even if this matter is continued) since they have relegated
21 their representation to a local California attorney by the name of D. Peter Harvey, see the
22 attached Draft Order from the Court compelling them to answer Items 1-12 within 10
23 days of the service of such request upon them, i.e., by October 6, 2007. Unless, this Court
24 requires them to stipulate to certain facts and information in writing, they will have
25 managed to dodge directly answering Thought’s questions and concerns and would have
26 failed to directly answered certain critical questions and ascertain certain important facts
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1 of extreme relevance to the Thought position that filing the Motion to Quash was a direct
2 and proximate result of the RedHat attorneys' (a) failure to respond to any of Thought's
3 email or fax communications during the period from August 10, 2007 through the filing
4 of the Motion to Quash on August 21, 2007, (b) failure to set up any meet and confer
5 communications to resolve the issues raised in the several communications from Thought
6 prior to August 21, 2007, and (c) failing to extend the LEGAL deadline for responding to
7 the Subpoena August 21, 2007 to permit adequate time to confer and attempt to come to
8 an agreement between the parties regarding the Thought issues and concerns respecting
9 the Subpoena.
10

11
12 Thus, Thought respectfully requests that Judge grant the appended Draft Order
13 requiring RedHat attorneys to stipulate to certain facts and information regarding prior
14 communications between the parties and upon several certain significant points that will
15 need to be discussed in such a meet and confer or that will be issues to be addressed at
16 the hearing within 10 days of their service. Upon obtaining complete answers to such
17 stipulations, Thought agrees in good faith to resolve all outstanding issues by conducting
18 a recorded telephonic meet and confer in a concerted attempt to settle all outstanding
19 issues between the parties.
20

21
22 DATED: October 1, 2007 Thought, Inc.

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24 

25 John Jason Gentry Mullins

26 Attorney to Non-Party Thought Inc.
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3 For good cause shown, Thought's request that RedHat Attorneys Jon Pierce and
4 Steve Moore ARE HEREBY FURTHER ORDERED to answer ITEMS 1-12 of nonparty
5 Thought, Inc.'s Request For Stipulation And Info as served on September 28, 2007 prior
6 to October 6, 2007 is Granted.
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11 _____
12 Judge, United States District Court

13 San Francisco, Division
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CERTIFICATE OF SERVICE

[CASE NO. C 07-80204 MISC MMC (EMC)]
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Third nonparty Thought, Inc. hereby certifies by and through its attorney John Jason Gentry Mullins that a true and correct copy of foregoing THOUGHT INC.'S MOTION TO COMPEL ANSWERS TO REQUEST FOR STIPULATIONS AND INFO RE MOTION TO QUASH THIRD PARTY SUBPOENA, AND REVISED PROTECTIVE ORDER: [PROPOSED ORDER] was served by at least one of US mail, fax or email to:

Allen F Gardner Potter Minton, A Professional Corporation 110 North College, 600 Plaza Tower Tyler, TX 75702	Steve Moore, Attorney and Partner, and Jon Pierce, Attorney Kilpatrick Stockton LLP 1001 West Fourth Street, Winston-Salem, NC 27101-2400 Phone: (336) 607-7503 Fax: (336) 734-2638
HARVEY SISKIND LLP D. Peter Harvey (SBN 55712) 4 Embarcadero Center, 39th Floor San Francisco, CA 94111 Telephone: (415) 354-6100 Fax (415) 391-7124	

DATED: September 28, 2007.



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